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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANK ASTA, *et al.*,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

No. 88-1783

BRIEF OF AMICUS CURIAE ILLINOIS STATE CHAMBER OF COMMERCE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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I.

INTEREST OF AMICUS

The Illinois State Chamber of Commerce, as the state's largest business organization, is made up of more than 5,800 business firms. The member companies come in all shapes and sizes, from every business sector, and from all parts of the State. The ruling of the Illinois Supreme Court here that Illinois has criminal jurisdiction over employment safety on matters already controlled by federal law through the Occupational Safety and Health Act, directly affects its membership. Consequently, the members of the Illinois State Chamber of Commerce are directly affected by an enormous personal liability now imposed by the State of Illinois.

Because of the significant statutory issues presented by this case, their nationwide impact, and the Illinois State

Chamber of Commerce's obligation to represent the interests of Illinois employers at stake here, it is necessary for the Illinois Chamber of Commerce to participate as *amicus curiae.*

Amicus curiae received consent to file this brief from counsel for both the petitioners and the respondent. Copies have been provided to the Clerk.

The accompanying argument urges this Court to grant the petition of Frank Asta, et al., and reverse the judgment of the Supreme Court of Illinois.

II.

ISSUE PRESENTED

Whether the Supreme Court of Illinois correctly found that its local prosecutors and grand juries have jurisdiction to prosecute employers under criminal laws for violation of worksite safety practices that otherwise conform with health and safety standards promulgated under the Occupational Safety and Health Act.

III.

SUMMARY OF ARGUMENT AND WHY THE WRIT SHOULD BE GRANTED

The Illinois State Chamber of Commerce is deeply concerned that the decision of the Supreme Court of Illinois in this case, *Illinois v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 534 N.E.2d 962 (1989), allowing local juries and prosecutors to inquire into the merits of workplace health and safety practices in areas otherwise covered by federal standards developed from scientific and technical inquiry, will deter the voluntary and uniform application of federal standards. The impact on the administration of the Act will be undercut and threatened if the State is able to administer a criminal program of its own that will inevitably lead to uneven results and unpredictable conclusions among the fifty states.

If state criminal prosecutions are permitted, the effectiveness of OSHA's important investigation, prevention, and settlement provisions will be dramatically undercut. Following a workplace accident, well-advised employers would have to advise management personnel, including officers and front-line supervisors, that they should always assert their First Amendment right against self-incrimination because a state criminal indictment is possible. Accordingly, OSHA investigations would be thwarted and settlement made impossible. These practices would not be available if state criminal prosecutions are disallowed.

Normal principles of federal preemption established by this Court in cases of state regulatory attempts of activity covered under the National Labor Relations Act, as within the preemptive jurisdiction of the National Labor Relations Board, clearly demand the preemption of state criminal regulation of workplace safety when such similar acts also fall within the jurisdiction of the Occupational Safety and Health Administration ("OSHA"). Because of the growing state developments on point and the uncertain guidance given to the nation's employers by the underlying decision, this Court should grant the writ of certiorari in this case in order to clarify the law and stem further erosion of OSHA's jurisdiction by state courts.

IV.

ARGUMENT

A. THE CONGRESS EXPRESSLY INTENDED FOR THE OSH ACT TO PREEMPT ALL STATE REGULATION OF WORKPLACE SAFETY UNLESS IT RECEIVED APPROVAL TO DO SO FROM THE U.S. SECRETARY OF LABOR

Until the decision of the Illinois Supreme Court in the instant case, it had become well settled that states lost both civil and criminal jurisdiction to prosecute employer's for alleged violation of workplace safety standards. *See Sabine*

Consol., Inc. v. Texas, 756 S.W.2d 865 (Ct. App. 1988); *Michigan v. Hegedus*, 169 Mich.App. 62, 425 N.W.2d 729 (1988). *Contra Wisconsin v. Black*, 144 Wis.2d, 745, 425 N.W.2d 21 (1988). The court below lost sight of the fact that the Congress in its very statement of purposes has demonstrated that the Occupational Safety and Health Act, was specifically intended to preempt state regulation where the federal government has already set a uniform standard.

Hence, section 2(b) of the OSH Act, 29 U.S.C. § 651(b), declares,

> it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.

The Congressional Findings and Purpose asserts that this will be accomplished through methods of encouragement, 29 U.S.C. § 621(b)(1), "by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions, 29 U.S.C. § 621(b)(2), by authorizing the setting of "mandatory occupational safety and health standards" and creation of a Commission to carry "out adjudicatory functions under the Act," 29 U.S.C. § 621(b)(3), by providing research to develop "innovative methods, techniques, and approaches for dealing with occupational safety and health problems," 29 U.S.C. § 621(b)(5), "by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions," 29 U.S.C. § 621(b)(6), "by providing medical criteria which will assure" the health of workers, 29 U.S.C. § 621(b)(7), "by providing for the development and promulgation of occupational safety and health standards," 29 U.S.C. § 621(b)(9), "by providing an effective enforcement program," 29 U.S.C. § 621(b)(10), etc.

On the face of the statute itself, therefore, is the congressional directive that nationwide standards be developed, a scientific and psychological approach for dealing with occupational safety and health installed, medical criteria utilized "to assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience," 29 U.S.C. § 621(b)(7), and "an effective enforcement program." 29 U.S.C. § 621(b)(10).

The County of Cook attempted to prosecute the petitioners for aggravated battery, reckless conduct and conspiracy under state law for having provided an unsafe workplace. The Petitioner, correctly, highlights the prosecutor's, use of the phrase "poisonous and stupifying substances" to reflect the criminal object of exposing workers to the substances which the County deems wrongful. The text of the indictment best illustrates the subject matter contemplated to be regulated by the State:

Aggravated Battery:

> "while having a duty to provide Danny Vaughn a safe workplace, knowingly, while engaged in the business of coating wire with enamel, polyvinyl chloride, and other substances authorized, commanded and committed acts of commission and acts of omission with the awareness that a substantial probability existed which would cause Danny Vaughn to take by deception, for other than medical purposes, poisonous and stupifying substances, to wit: substances including but not limited to, trichloroethylene, xylene, cresol, phenol, n-methyl-2-pyrrolidon, 4-methyl-2-pentanone, ketone, urethane, polyvinyl chloride, toluene diisocyanate, aluminum dust, copper dust, and naptha, and such acts caused harm to Danny Vaughn in that: contrary to the Stature, and against the peace and dignity of the same People of the State of Illinois."

Indictment of Chicago Magnet Wire Corp., December 4, 1984 (emphasis added).[1]

The remaining acts leading to the subsequent counts of individual liability against petitioners, such as for aggravated battery, include the failure of petitioners to provide employees protection, "necessary safety instructions and necessary safety equipment and sundry health monitoring systems" for the substances that "can be taken into the body by inhalation and skin absorption." Count 2.[2] That the substances were stored in an adverse manner causing "harmful exposure to them by both inhalation and skin absorption." Count 3. That the "defendants provided inadequate ventilation." Count 4. Finally, the State complains the "defendants maintained dangerously overheated working conditions . . . while working with . . . poisonous and stupifying substances." Count 5.

While reading like an OSHA citation, for failure to procure and provide an employee with safety devices, the conspiracy counts also allege a violation of Ill. Rev. Stat. 1983, Ch. 38, Sec. 8-4, for undertaking an allegedly criminal act to increase ventilation of the plant "[d]uring an Occupa-

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[1]Each of the following enumerated substances has been issued a standard by OSHA. *See* OSHA TABLE E-1-A. Furthermore, the substances have been evaluated By the National Institute for Occupational Safety and Health (NIOSH) pursuant to the OSH Act and assigned protective exposure levels. The NIOSH Registry of Toxic Effects of Chemical Substances (RTECS) number for these substances are as follows: trichloroethylene (KX45500000), xylene (ZE2100000), cresol (GO5950000), phenol (SJ3325000), 4-methyl-2pentanone (SA7875000), ketone (MJ5075000), toluene diisocyanate (CZ6300000), aluminum dust *(see* OSHA standard), copper dust (GL5325000), and naptha (GF8635000).

[2]This count appears to make it criminal for the petitioners to have not communicated the chemical hazards of the materials in use at the plant. To the extent it does do so, it is preempted. OSHA's Hazardous Communication regulation, 29 C.F.R. § 1910.1200(a)(2): expressly provides that

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject.

Federal regulations under OSHA will preempt state law. *Ohio Mfrs. Assn. v. Akron*, 801 F.2d 824, 831, 834 (6th Cir. 1986); *United Steelworkers v. Auchter*, 763 F.2d 728, 733 (3d Cir. 1985); *Environmental Encapsulating Corp. v. New York*, 666 F. Supp. 535 (E.D.N.Y. 1987).

tional Safety and Health Administration air sampling survey... on July 21, 1983."

The fact that the State of Illinois has developed no plan of its own under the OSH Act, when the Congress has otherwise authorized the state to exercise jurisdiction over workplace safety by submitting a plan for development and enforcement of workplace standards, further evidences the preemptive intent of the Act. Sections 18(a) and (b) provide that:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this Title.
>
> (b) Any State, which at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under Section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

Rather than following this authorized procedure that may allow for more strict state criminal sanctions for occupational accidents, the State of Illinois proceeds as if these two sections of the OSH Act did not exist. *See People v. Hegedus*, 169 Mich. App. 62, 425 N.W.2d 729, 731 (1988) (explaining that the state under an approved plan may implement "criminal penalties in excess of OSHA").

Contrary to the Supreme Court of Illinois's resolution of the preemptive effect of the federal statute here, the analysis incorrectly assesses the comprehensive nature of the federal statute. Specifically, the court recognized that, "although the provisions of OSHA are comprehensive," 126 Ill.2d at 367,it concluded that the invitation of the States to establish their own plan "demonstrates that it did not intend to preclude supplementary State regulation." Thus, the court also con-

cluded that "there is nothing in OSHA or its legislative history to indicate that Congress intended to preempt the enforcement of State criminal law simply because of its incidental regulatory effect." 126 Ill.2d at 366. Section 18(a) is to the contrary.

First, Congress invited a plan from the State. Illinois has refused to enact such a conforming legislative plan. Second, it is precisely the "incidental" effect on OSHA standards that requires preemption of Illinois criminal law. Congress' invitation to the States to directly participate if it "desire[d] to assume responsibility for *development* and *enforcement* of occupational safety and health standards," is clear on the face of the statutory language. (emphasis added). Rather than undertaking the development of uniform standards based on scientific fact, and assuming the concomitant financial burden *(see* 29 U.S.C. § 667(c)(5)), state juries will be able to set ("develop") standards in their home states through precedent and imagination of danger. One could easily comprehend a jury setting a criminal standard of workplace conduct involving AIDS or other incapacitating disease based upon its impression of the danger of contamination. Countenancing or branding employer activity in this manner might also contravene the protections given such persons under federal health or anti-discrimination laws, such as the Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S. § 794, or Title VII, 42 U.S.C. § 2000e. Local attitudes, cannot be allowed to interfere with the object of the carefully interwoven federal plan in this manner.

In *Brown v. Hotel & Restaurant Workers,* 468 U.S. 491, 104 S. Ct. 3179 (1984), this Court addressed the statutory scheme to regulate New Jersey casino unions despite the existence of the National Labor Relations Act's coverage of these unions. The Court in *Brown* explained that,

> Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law

> exists when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404 L.Ed. 581 (1941).

104 S. Ct. at 3186.

In deciding that New Jersey's regulation of employee conduct in the casino industry was not preempted, the Court affirmed the usual evidentiary model that where conduct is "arguably" covered by federal law, there is a presumption of preemption. There, New Jersey's interest in preventing "crime, corruption and racketeering" were found not inconsistent with the Labor Management and Reporting and Disclosure Act's requirements of Congress and the Congress' approval of a compact by New Jersey with New York State in the matter showed the absence of a specific intent that "qualifications of casino industry officials does not actually conflict with § 7 and so is not preempted by the NLRA." *Id.* at 3190.

The burden of Illinois, similarly, is to disprove preemption, rather than defend a presumption that the federal statute is not preempted. In the instant case, the existence of sections 18(a) and (b) show that Congress "has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject." *Brown,* 104 S. Ct. 3185-86.

The Illinois Supreme Court also contends that although the "penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law." However, that method of regulation, does directly affect an employer's ability to comply with fairly developed OSHA standards when the pattern of prosecutorial discretion is not uniformly followed by the state and cannot be compelled. Under an

announced inspection and enforcement procedure set forth in an approved plan, which the imposition of an approved State plan would clearly afford, the standards of conduct and safety could be plainly followed, rather than arguably discerned by employers from jury verdicts.[3]

Clearly, the "incidental" effect of state criminal jurisdiction in fact will establish new standards and duties for employers. The cumulative effect of such litigation in the fifty states will blossom into a variety of standards and different results. Uniformity was Congress' goal. *Legislative History of the Occupational Safety and Health Act*, 144, 413, 444 (1971). Congress could not have contemplated its action could return the law in states without plans, to vagaries of general criminal law or haphazard enforcement activities; precisely the object of congressional contempt which the OSH Act was enacted to reverse. *See Wisconsin Dep't of Industry v. Gould, Inc.*, 106 S.Ct. 1057, 1062 (1986) ("Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress"). The lower courts are virtually unanimous in declaring that local and state regulation of employer conduct in areas covered by OSHA are preempted:

1. Hazard Disclosure Laws: In *United Steelworkers of America v. Auchter*, 763 F.2d 728 (3d Cir. 1985), the court invalidated the hazard communication laws of the states of New York, Illinois, and New Jersey; *Manufacturers Ass'n. of*

[3] The Court should also be aware that the Occupational Safety and Health Review Commission has the power to preclude state review of evidence and activities investigated by OSHA. In *Monsanto Company*, OSHRC Docket No. 86-391 (Dec. 4, 1987), the Commission entered a settlement order and stipulation precluding use of "any documents gathered or prepared in connection with this matter shall be offered, disclosed, used or admitted in evidence in any other proceeding or litigation, whether state or federal, or whether civil, criminal or administrative, except for subsequent proceedings pursuant to the Occupational Safety and Health Act." Unless the federal agency's declaration of the scope of its jurisdiction is a nullity, the Act must contemplate the preclusion of state jurisdiction in certain cases deemed appropriate by the Commission. Consequently, there must exist exclusive federal power over workplace health and safety and the preclusion of state criminal laws, unless a state plan has been approved.

Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986) (finding Pennsylvania's informational statute preempted; *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (ordinance regulating hazardous and toxic substances preempted).

2. Hazardous Substances Posting: In *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), the court also found that Pennsylvania's statute requiring the posting and listing of hazardous substances found in the workplace was preempted.

3. State Workplace Survey Laws. In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court invalidated a provision of New Jersey law requiring the disclosure to the public of certain hazardous substances in the manufacturing sector.

4. Labeling of Containers. State laws requiring employer's to label containers with hazardous substances were held preempted in the following cases: *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (New Jersey statute required labels with chemical names and Chemical Abstracts Service number); *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986) (Pennsylvania statute requiring labels on containers and pipelines); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (ordinance requiring labeling, tagging, or marking container with chemical name, cancer warning, and reproductive warning).

5. Duty of Employers to Communicate with Employees: In *Manufacturers Ass'n. of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), the court held that Pennsylvania's requirement that employers supply employees with the contents of material safety data sheets prepared by the state was preempted. *Also Environmental Encapsulating Corp. v. New York*, 855 F.2d 48, 54 (2d Cir. 1988); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986) (same).

6. Employee Training Programs: Laws requiring that employers initiate and maintain programs to inform their workers on workplace hazards were preempted by the OSH Act. *See Manufacturers Ass'n. of Tri-County v. Knepper*, 801

F.2d 130 (3d Cir. 1986); *Ohio Mfrs.' Ass'n v. Akron*, 801 F.2d 824 (6th Cir. 1986).

It has also been settled in Illinois that the state could not adopt safety and health standards where no plan had been submitted to the Secretary of Labor for approval. In *Stanislawski v. Industrial Comm.*, 99 Ill. 2d 36, 457 N.E.2d 399 (Ct. App. 1983), a case involving a claim for additional damages for the death of an employee in cases of wilful violation of such standards, the Illinois court held that an Illinois statute which adopted all rules or standards promulgated by the U.S. Secretary of Labor as its own was preempted by OSHA. The court found that § 667(b) of the OSH Act required the approval of a state plan for the development of standards and their enforcement. Without such a plan, there was no state standard in force and additional compensation could not be granted.

B. STATE CRIMINAL PROSECUTIONS WILL IMPAIR THE ABILITY OF OSHA TO INVESTIGATE WORKPLACE ACCIDENTS AND WILL HARM THE ABILITY OF THE AGENCY TO ENSURE WORKPLACE SAFETY AND HEALTH FOR ALL WORKERS

It is the position of amicus curiae that the Congress never intended for States to regulate as crimes those activities regulated by standards established by OSHA. Even as a matter of federal policy, OSHA would not have the authority to permit more severe criminal penalties on employer's than those imposed by the OSH Act itself, for to do so would undermine the ability of OSHA to prevent future accidents because of the interposition of the Fifth Amendment's active safeguards against compulsory process in criminal prosecutions. Consequently, the policy gleaned from the caselaw and review of the OSH Act itself, demonstrates that state jurisdiction of workplace health and safety matters are preempted.

In *Allis-Chalmers Corp.*, 20 O.S.A.H.R.C. 546, 3 O.S.H.C. (BNA) 1629 (1975), the Commission held that "the Occupational Safety and Health Act and the standards must

be construed strictly, not loosely." Even though it is not denominated a criminal statute under the U.S. Code, the Occupational Safety and Health Act's purpose and effect is to punish an employer. For that reason the Act and the regulations must be construed like a criminal statute and appropriate protections given to respondents. *Schild v. Busch*, 293 F. Supp. 1353, 1355 (1968) (holding marketing penalties under the Agricultural Adjustment Act, 7 U.S.C. §§ 1281-1393, construed strictly "as if they were criminal statutes").

Illinois has also refused to demonstrate that even if an employer complied with an OSH standard, the State and its prosecutors, would preclude use of their discretionary exercise of criminal jurisdiction. All the Illinois Supreme Court could suggest was that "in practical terms... it is unlikely that the state would bring a prosecutive action." 126 Ill.2d at 373.

Yet, in the instant case, the "poisonous and stupifying" substances complained of by the State are precisely those regulated by OSHA. *See* note 1, *supra*. The reality, then, is that Illinois either believes that OSHA standards are insufficient protective standards, irrelevant to intent, or that the OSH Act's enforcement mechanism to determine the violation of those standards is insufficient. Either way, the need for Congress to have intended preemption of state prerogatives represented in this matter is clear.

Illinois also espouses an interest in invoking "historic police powers" and suggesting that the "power to prosecute criminal conduct" and "[t]he regulation of health and safety has also been considered as 'primarily, and historically' a matter of local concern." 126 Ill.2d at 367. Again, the State has failed to demonstrate that it has ever exercised such jurisdiction before or that it in fact has a body of law that can be gainsaid to regulate the storage and use of industrial chemicals, specifically made the subject of the indictment. Rather, the State wishes to adopt an independent and unapproved statutory plan that complements the OSH Act:

> Thus, the criminal charges here do not set any new or other standards for workplace safety but rather

> seek to impose an *additional sanction* for an employer's conduct that, if proved, would certainly violate the duty set out in section 654(a) of OSHA (29 U.S.C. § 654(a) (1982)).
>
> 126 Ill.2d at 366.
>
> State criminal law can provide a valuable and *forceful supplement* to insure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment.
>
> 126 Ill.2d at 373.

This finding that "Congress . . . did not intend to preclude supplemental State regulation," 126 Ill.2d at 367, cannot withstand scrutiny, just as Wisconsin's contract debarment program was found tantamount as "supplemental" regulation of federally prescribed conduct and therefore preempted by the NLRA. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 106 S. Ct. 1057, 1062 (1986). *Also Five Migrant Farmworkers v. Hoffman*, 136 N.J. Super. 242, 345 A.2d 378 (N.J. 1975) (state law with respect to general working conditions preempted by the OSH Act). In *Gould*, 106 S. Ct. at 1061, the Court settled the circumstances where a State could affect a comprehensive federal regulatory plan:

> Because "conflict is imminent" whenever "two remedies are brought to bear on the same activity," *Garner v. Teamsters*, 346 U.S. 485, 498-499, 74 S.Ct. 161, 170, 98 L.Ed. 228 (1953), the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, *but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.* The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," *id.*, at 243, 79 S.Ct., at 778, and this Court has recognized that *"[c]onflict in technique can be fully as disruptive to the system Congress erected as*

> *conflict in overt policy." Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287, 91 S.Ct. 1909, 1918, 29 L.Ed.2d 473 (1971). (Emphasis Added).

Illinois is clearly attempting to expand its jurisdiction to coverage already established by the federal scheme. The possibilities for interference by *ad hoc* application of criminal law to OSHA covered activities are endless. In a hypothetical case where a death has occurred at a jobsite, OSHA criminal jurisdiction would clearly apply. Under Illinois' view, there would be a rush to the courthouse by state prosecutors to determine criminal liability and to gather evidence. The Fifth Amendment right of the defendant employer, rather than investigation of the accident to determine its cause and whether it could have been avoided, would immediately become the matter in controversy. This would impair any subsequent OSHA investigation, an opportunity for OSHA to determine what occurred, and whether the circumstance might be prevented in the future. In the latter event, immediate alert notices could be released to the nation's employers. "The object of these provisions is prevention of injury or death." *United States V. Dye Constr Co.,* 510 F.2d 78, 82 (10th Cir. 1975); *Western Waterproofing Co.,* 1975 O.S.H.D. (CCH) ¶ 19,925 (1975).

There also would be a great reluctance by an employer-defendant to abate the problem, correct and resolve it during the pendency of state criminal proceedings. Even an approved state OSHA plan has not been interpreted as intending to "create a police agency over California business, it was intended to provide a healthful environment." *Salwasser Mfg. Co. v. Municipal Court,* 94 Cal. App.3d 223, 156 Cal. Rptr. 3d 292 (1979). Finally, the state's indictment would preempt OSHA's own criminal prosecution, for OSHA withholds the issuance of a citation until a decision is made by the Justice Department whether or not to prosecute the matter criminally. *Cedar Constr, Co.,* 5 O.S.H.C. 1311 (1977).

Here, the State of Illinois is attempting to regulate substance use through its criminal process without demonstrating

that the use of the aforementioned "poisonous and stupifying" chemicals exceeds federal standards in the workplace, thereby attempting to establish its own acceptable level of use within its jurisdiction.[4]

Finally, the State relies upon acts taken during an OSHA enforcement inspection of Chicago Magnet Wire Corp., to establish an element of criminal conspiracy from acts which, if true, would be clearly covered by OSHA for remedy and rectification. The State, however, has taken it upon itself to find such an act to be illegal against the federal agency, if true, and regardless of whether such acts were lawful or required to be taken. This is beyond the jurisdiction of the State in all known process under law.[5]

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[4] Under section 4(b)(4), 29 U.S.C. § 635(b)(4), the OSH Act expressly reserves to the states jurisdiction "with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." Illinois has not demonstrated that the criminal statutes it is employing against the petitioners, arose from statute or law of a specific nature in these three areas. Illinois, however, attempts to use a statute of general jurisdiction that is not "employment" specific to seek retribution. A state workmen's compensation statute is such a specific law that affects "employment" alone and is therefore not preempted by OSHA.

[5] This may also create an express conflict with a decision of the Secretary of Labor when authorizing a variance to an employer from the standards under § 6(d) of the OSH Act: "The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." Sec. 6(f), 29 U.S.C. § 655(f). The strain between the health and safety laws if federally authorized variances could be disregarded by state prosecutors would be self-evident.

V.

CONCLUSION

For the reasons stated above, amicus curiae Illinois State Chamber of Commerce, submits that the Court should issue the writ of certiorari to review the decision below and then reverse the decision of the Supreme Court of Illinois.

Respectfully submitted,

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